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No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent's Brief in Opposition illustrates the confusion in which the important Fifth Amendment questions presented by this case is mired. Respondent's principal contention (Br. in Opp. 6; emphasis added) is that the decision below was "a routine application of long standing precedent that *an individual cannot be compelled to produce * * * records and documents in his possession or control which incriminate him.*" However, the "precedent" upon which respondent relies is squarely contrary to the holding in *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court's most recent and important decision in this area. In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (*id.* at 394). This Court held that the attorneys could not resist an IRS summons for those papers on grounds of attorney-client privilege because the Fifth Amendment would not have

prevented disclosure of the documents if they had remained in the taxpayers' possession. Assuming that the "papers on their face might incriminate the taxpayer" (*id.* at 409), the Court nevertheless held that the taxpayers could have been required to produce them (*id.* at 414). In short, *Fisher* was a case in which, contrary to the rule invoked by respondent, individuals were held to be required to produce incriminating records and documents in their possession.

2. Respondent misleadingly states (Br. in Opp. 7) that the courts of appeals have unanimously concluded that the Fifth Amendment bars "compelled production by a sole proprietor of his incriminating documents."[1] On the

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[1]We disagree with respondent's suggestion (Br. in Opp. 7-8) that the Second, Fourth, and Ninth Circuits, like the Third and Fifth (see Pet. 9-10), have concluded that the contents of a sole proprietorship's standard business records are protected by the Fifth Amendment. The documents in *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976) (a taxpayer's letters to his accountant), and *United States* v. *Plesons*, 560 F.2d 890 (8th Cir. 1977) (a doctor's "private medical papers") were more akin to purely personal papers, such as personal diaries and correspondence, than to the standard business records, such as ledgers, vouchers, and bank statements, involved in this case (see Pet. App. 3a n.2). See also Pet. App. 11a-12a (interpreting *Beattie* as applying to "private papers").

In *United States* v. *Penrod*, 609 F.2d 1092, 1095 (4th Cir. 1979), the court merely "assume[d] without deciding" that the defendant could have declined to comply with a subpoena for his sole proprietorship's invoices. The court then held (*ibid.*) that by complying with the subpoena the defendant had waived "any Fifth Amendment right he may have possessed."

In *United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977), the court held that remarks made by the prosecutor during a trial for tax offenses did not constitute comment upon the defendant's refusal on Fifth Amendment grounds to produce personal books and records relating to his taxes. Not only were the papers in question not standard business records, but the government did not even challenge the taxpaper's "invocation of his Fifth Amendment rights" (549 F.2d at 716), and the court's suggestion that the taxpayer was entitled to resist production

contrary, however, as noted in our petition (at 10), the First Circuit has concluded that " '[t]he line of cases culminating in *Fisher* have [sic] stripped the content of business records of any Fifth Amendment protection; such protection is afforded only to the testimonial content of the act of turning over the records under compulsion.' " quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980). See also *United States* v. *Doe*, 628 F.2d 694, 696 (1st Cir. 1980). Cf. *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980). Indeed, *Martinez* and *Doe* are directly parallel to the present case, and the decisions in those cases conflict with that below. In *Martinez*, the court vacated an order quashing a subpoena for documents prepared by a physician. Concluding under the circumstances that "compliance with the subpoena would produce incriminating authentication evidence" (626 F.2d at 1055), the court remanded the case so that the government could grant the physician "use immunity as to the testimony implicit in the [act of production]" (*id.* at 1058). Similarly, in *Doe*, the court vacated an order quashing the portion of a subpoena seeking records prepared and possessed by an accountant. As in *Martinez*, the court remanded so that act of production immunity could be extended. Here, by contrast, the

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may have been based upon problems arising from the act of production (see *id.* at 716 n.3), rather then any supposed privilege respecting the contents of the documents.

In *United States* v. *MacKey*, 647 F.2d 898 (9th Cir. 1981), the court held that a corporate officer's diary, calenders, and appointment books, which contained both business and personal notations, were corporate documents and thus not privileged. That decision illustrates the anomalous distinction now drawn by many courts between corporate and partnership records, on the one hand, and sole proprietorship records, on the other. It is difficult to see why the diaries, calendars, and appointment books of a corporate officer or a partnership employee should have less protection from compelled production for use against that individual than identical documents possessed by a sole proprietor.

government offered respondent the fuctional equivalent of act of production immunity, but the court of appeals affirmed the quashing of the subpoena. The decisions of the courts of appeals are thus in conflict.[2]

3. The court below drew a distinction (Pet. App. 5a-8a) between the scope of the protection afforded the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other, but the court itself described that distinction as "irrational" (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez), supra,* 626 F.2d at 1056) and stated that treating all preexisting business records the same way had "considerable analytic appeal" (Pet. App. 6a). Respondent seeks to defend (Br. in Opp. 9) that "irrational" distinction on the ground that it reflects the different "protections afforded an individual as opposed to an artificial entity or a collective group." However, respondent's argument is untenable because the corporate officer or partner who may be compelled to produce documents that incriminate *him* is not "an artificial entity or a collective group." It is surely anomalous that one doctor, lawyer, or businessman may be required to produce incriminating documents in his possession simply because he has

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[2]To be sure, in the present case the government did not make a formal request for statutory immunity, as prescribed by the First Circuit (see *Martinez, supra,* 626 F.2d at 1058). The government's reasons for not doing so are explained in the petition (see Pet. 18-19) and page 6, *infra.* In any event, even if such a request was required, *Martinez* and *Doe* make it clear that in a case such as this, the First Circuit at the least, would have vacated the order quashing the subpoenas and remanded so that the appropriate form of immunity could be extended. Not only did the Third Circuit refuse the government's request for such a remand, but the court's holding that the *contents* of a sole proprietorship's business records are privileged (see Pet. App. 14a) made it clear that no form of act of production immunity would have sufficed.

incorporated, whereas another doctor, lawyer, or businessman may properly refuse to produce identical documents because he practices or does business as a sole proprietorship. Abstract distinctions based upon the fact that corporations and partnerships are "artificial" entities or "collective" groups do not adequately explain such strikingly dissimilar results.

4. Respondent contends (Br. in Opp. 12) that the court of appeals correctly concluded that the act of producing the subpoenaed documents would have been incriminating. Respondent distinguishes *Fisher*, in which this Court reached the opposite conclusion, because in *Fisher* the papers "did not belong to the taxpayer, were not prepared by him and did not contain his testimonial declaration" (*ibid.*). As explained in our petition (at 14-15), however, none of these distinctions comports with the broad principle upon which *Fisher* was based. In addition, these distinctions do not satisfactorily explain the decision in this case (see Pet. 14-15). More important, distinguishing *Fisher* on these grounds, as the court of appeals did (Pet. App. 14a-17a), limits *Fisher* to the unusual situation presented in that case, where the papers at issue were not written, prepared, or owned by the person from whom they were sought. That situation will naturally arise infrequently and can be easily avoided simply by transferring title to the documents. Under the decision below, however, the discredited rule of *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), would continue to apply in all other situations. If *Fisher* is to be limited in this fashion, this Court and not the lower federal courts should do so.

5. Finally, respondent argues (Br. in Opp. 13) that "[t]he problem with the Government's offer of immunity in the District Court is that they to this day refuse to state what is being immunized." However, the government unambiguously stated that immunity should be granted " 'with

respect to the act of production' " (Pet App. 19a; citation omitted).

Respondent maintains (Br. in Opp. 13) that the government should have made a formal request for statutory immunity under 18 U.S.C. 6001-6003. This argument, which echoes that of the court of appeals (Pet. App. 19a-20a), is disingenuous. As we expalined in our petition (Pet. 18 n.9), "[t]he government did not make a formal request * * * because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all documents listed in the subpoenas rather than showing that the act of producing particular documents or categories of documents would amount to testimonial self-incrimination." Because respondent's Fifth Amendment claim was overbroad, the government was given the Hobson's choice of requesting that respondent be granted immunity to which he was not entitled under the Fifth Amendment or of getting no immunity grant whatsoever.[3]

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[3]We also wish to call the Court's attention to the recent decision of the Tenth Circuit in *In re Grand Jury Subpoena Duces Tecum*, No. 82-2093 (Jan. 5, 1983), which conflicts with the holding below that a person who resists compliance with a subpoena on Fifth Amendment grounds may rest upon a blanket assertion of the privilege (see Pet. App. 18a-19a). In the present case, respondent asserted the Fifth Amendment privilege as to all documents sought, including those that he did not prepare (see *id.* at 16a) and common categories of business records (see *id.* at 3a n.2), the possession of which would not appear to be incriminating. Without requiring that respondent explain why the act of producing each category of documents constituted testimonial self-incrimination, the court concluded (*id.* at 19a) that respondent "did not improperly assert his fifth amendment rights."

The Tenth Circuit, by contrast, held (*In re Grand Jury Subpoena Duces Tecum, supra*, slip op. 3-5) that taxpayers served with a subpoena for their tax returns, related work papers, financial statements, and correspondence could not properly invoke the Fifth Amendment privilege without explaining why it applied to each document at issue. The

In conclusion, we think it beyond serious dispute that the issue we present is one of the most significant unsettled questions concerning the proper interpretation of the Fifth Amendment privilege against compelled self-incrimination. The issue is of manifest practical importance, and this is, we submit, an appropriate vehicle for the Court to resolve it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
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court noted (slip op. 4) that "the record did not identify which documents were in fact authored by the [taxpayers]" — a fact apparently not found relevant by the court of appeals in the present case (see Pet. App. 16a).

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